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Screening Versus Plea Bargaining: Exactly What Are We Trading Off?

Gerard E. Lynch*

I was delighted to be invited to comment on Ronald Wright and Marc Miller's important and instructive article, *The Screening/Bargaining Tradeoff*.¹ Those familiar with the authors' work, including their original and fascinating criminal procedure casebook, will be unsurprised by many of the article's virtues, including a focus on empirical examination of real-world practice and (perhaps a special case of that more general virtue) attention to practices at the state and local level, where most criminal law enforcement actually occurs.² Wright and Miller develop some interesting insights into the potential for changes in plea bargaining practices that have frequently been treated as inevitable, and they do so, characteristically, through a close examination of actual practice in a particular district attorney's office. Their provocative article deserves, and will surely receive, a wide and appreciative readership.

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1. 55 STAN. L. REV. 29 (2002).

2. MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES—PROSECUTION AND ADJUDICATION: CASES, STATUTES, AND EXECUTIVE MATERIALS (1999). This casebook is groundbreaking—or perhaps represents an innovative return to an older tradition—in treating criminal procedure, like other subjects in the core law school curriculum, as primarily a state law subject, in which more than fifty American jurisdictions have developed diverse solutions to common problems, rather than as a branch of constitutional law supplemented only by the Federal Rules of Criminal Procedure. Recognizing both that federal practice presents neither the most important nor necessarily the best solutions to sub-constitutional issues, and that state constitutional law is creating diverse solutions even to those problems for which the United States Constitution provides a required minimum set of rights, the authors present a far more complex and empirically sound picture of criminal procedure as it is actually practiced in the jurisdictions in which over 90% of criminal cases are actually prosecuted. It is doubtful whether the federal-law bias of law school curricula or the understandable desire of students and teachers for a simplified overview will easily yield to this novel pedagogical approach, but whether or not the book becomes a classroom standard, it has already taken its place as one of those rare casebooks, from Hart & Wechsler's *Federal Courts and the Federal System*, to Brest's *Processes of Constitutional Decisionmaking*, that represents a substantial scholarly contribution to its field. See PAUL BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS (1st ed. 1975); HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1st ed. 1953).

The article argues that plea bargaining can be greatly reduced, or even eliminated, without increasing the number of trials to an unmanageable level, by significantly increasing the prosecutorial screening function. The authors point to a careful review of the experience in New Orleans, where the District Attorney has instituted just such a policy, as proof that it can be done. They proclaim that we have missed the point, over the years, by perceiving plea bargaining as a tradeoff against trials, and that we can avoid trials without resorting to plea bargaining by adopting aggressive prosecutorial screening.

Coming from a federal background in which intake is traditionally a more discretionary function than is typical of prosecutors' offices without the luxury of limited jurisdiction, I certainly agree with the authors that careful screening of cases to eliminate unrealistic charges is desirable. And I have no quarrel with the authors' impressive demonstration that a policy that emphasizes such screening will reduce the need for further charge reductions as part of a plea bargaining process.

But I have a different perspective on the significance of the authors' findings, which goes to the heart of their claim that aggressive prosecutorial screening of cases at the intake or precharge stage represents a significant *alternative* to the plea bargaining system as it currently operates in most places. In my view, aggressive screening is more accurately characterized as a *refinement* of the essential features of the current plea bargaining system. I doubt that the authors are correct to dismiss the traditional idea that the present plea bargaining system is properly seen in opposition to a system of trials. Our differences probably derive from different senses of what plea bargaining *is* and what, if anything, is problematic about it.

In questioning "the traditional plea bargaining/trial tradeoff," and seeking to replace it with a model in which the proper tradeoff is seen as one between plea bargaining and prosecutorial screening, Wright and Miller rather tellingly start with plea bargaining as the baseline system, and ask which of their two alternatives, trials or screening, can best serve as a viable substitute for it. The question seems to be: Can we eliminate plea bargaining without incurring the burden and expense of a vastly increased trial docket? Putting aside for the moment other questions about this formulation, it is readily apparent that asking the question in this way avoids the real reason that plea bargaining is traditionally seen as in opposition to trials: It is the *trial* that is the official baseline system, proclaimed in the Constitution, in all state and federal variations of criminal procedure rules, and in the popular imagination as educated in civics classes and entertained by American media. A system of disposition by guilty plea, whether or not it is properly called plea bargaining, and whether or not it includes aggressive prosecutorial intake screening, stands as a clear alternative to the official adversarial jury-trial model of criminal procedure.

Thus, there is a tradeoff between plea bargaining and trials, not merely in the practical sense that (as some have argued and as Wright and Miller dispute) we might not be able to reduce plea bargaining without increasing the number of trials, but in the deeper sense that plea bargaining (and variant systems of agreed disposition) exists in the first place as an alternative to the expense and uncertainty of trials. It is in this sense that I would argue that plea bargaining is best seen as an alternative to a trial system, and that the screening system that appears to operate in New Orleans is simply a variant or refinement of a system of disposition in which the prosecutor, rather than a judge or jury, is the principal adjudicator of guilt and punishment, and the defendant's role is to acquiesce in that determination, rather than to contest it before a neutral adjudicator. For those who object to the current system of negotiated dispositions because it replaces the public assessment of evidence by lay adjudicators with a less transparent resolution by professional executive-branch law-enforcement officials, the New Orleans system of increased screening and decreased bargaining hardly seems like an improvement.

In what sense, then, does the screening system eliminate the defects of a plea bargaining regime? Wright and Miller seem to focus on *bargaining* as the key negative characteristic of adjudication by guilty plea. This is evident in their emphasis on features of the New Orleans system that limit postindictment reductions in charges. Their emphasis, in other words, is on the value of screening in reducing not the number of cases in which the defendant pleads guilty, but the number of cases in which defendants plead to *lesser* charges than those originally filed.

It is unclear just what is wrong with such reductions in charges, though the assumption that they are undesirable is widespread. "Plea bargaining" is a loaded term, which appears to imply both substantive and procedural irregularity. Substantively, it suggests that defendants receive "bargains"—in the sense of discounts—from the presumptively appropriate charge or penalty for their crimes. But there are precious few bargains to be had for defendants. Yes, defendants who plead guilty are likely to receive lower sentences than defendants guilty of similar crimes convicted after trial. It is not clear, however, why we should privilege the sentences received by the tiny minority of defendants who go to trial as the "correct" sentences, from which the sentences received by defendants who plead represent an unduly lenient departure. In a system where ninety percent or more of cases end in a negotiated disposition, it is unclear why the "discounted" punishment imposed in that ninety percent of cases should not rather be considered the norm. Where almost no one pays the "manufacturer's suggested retail price," and almost everyone buys the item at a "discounted" price, no one really gets a "bargain," and the product's real price is what is actually charged in the marketplace.

This may pose a problem of transparency, and is hard on those few who for whatever reason find themselves paying retail, but there is no reason to assume

that offenders who receive "plea bargained" dispositions are receiving any lower a sentence or charge of conviction than the system as a whole regards as appropriate for their case. We are predisposed to regard the pleading defendant as receiving a discount precisely because a fully litigated jury trial is theoretically normative, because its outcome therefore has greater legitimacy, and because we are constitutionally prohibited from recognizing that the system attaches a penalty to going to trial. Given the extreme severity of sentencing in the United States by world standards,³ however, it is hard to take seriously the notion that ninety percent of those serving our remarkably heavy sentences are the beneficiaries of "bargains."⁴

But even if we assume for the sake of argument that giving lesser sentences to induce guilty pleas results in sentences that are unduly lenient, Wright and Miller notably do not suggest that defendants who plead guilty in New Orleans receive the same sentences as similar defendants convicted after trial. If they do, then, from the perspective of those who believe that plea bargains result in insufficient sentences, New Orleans will have accomplished the difficult task of getting defendants to give up their right to trial, with the attendant chance, however slight, of confusing a jury enough to secure an acquittal, without offering anything in exchange. This seems rather unlikely, and the authors make no such claim. If, on the other hand, defendants who plead guilty receive an imprecise, unannounced, yet roughly predictable sentencing discount from judges in exchange for their waiver of rights, the elimination of "plea bargaining" by prosecutors seems much less significant. There may be reasons why an implicit bargain between defendants and judges who are understood to reward guilty pleas with leniency is preferable to express bargaining with defendants by prosecutors to accomplish the same end.⁵ But I suspect few

3. Marie Gottschalk, *Black Flower: Prisons and the Future of Incarceration*, 582 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 197 (2002) ("Today, the rate of incarceration in prison is 478 per 100,000. If jailed inmates are included, the rate jumps to 699 per 100,000, which is six to ten times the rate of the Western European countries. . . . This constitutes a higher proportion of the adult population than any other country in the world except Russia." (citations omitted)).

4. David Friedman has presented an argument, rooted in game theory, that plea bargaining as an institution actually tends to raise sentences for defendants. DAVID D. FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 91-92 (2000). My point is more modest and does not depend on accepting this analysis. I claim only that the sentences actually meted out to defendants under the plea bargaining regime, which determines over 90% of the quite harsh sentences imposed in the United States, rather than theoretical statutory maxima or the relative handful of even heavier sentences imposed after trial, should be regarded as the normative and appropriate level of sentencing in the United States, and are certainly not, by any objective standard, unduly lenient.

5. Like Wright and Miller, I am sympathetic to the values of "open pleas," in which defendants plead guilty without an agreed or prosecutor-recommended sentence. Wright & Miller, *supra* note 1, at 91. Such pleas leave the sentencing decision to a judge, rather than to a prosecutor, and thus preserve more of a role for an independent judiciary in the criminal

critics of plea bargaining would consider substituting the former system for the latter a major accomplishment.

Procedurally, plea “bargaining” suggests an inappropriate *process* of adjudication, by implying that guilt and punishment are determined by some form of mercantile haggling rather than objective inquiry. But the process of negotiating pleas, in my experience, is not accurately regarded as one of “bargaining,” if by that one imagines some simplistic model of haggling over prices. Wright and Miller at times seem implicitly to adopt this model: The prosecutor sets the bid artificially high by overcharging at the outset; the defendant balks and proposes that the charges be dismissed; the parties then settle on a compromise somewhere between these two extremes. The authors rarely, if ever, consider the possibility that the “bargaining” process involves discussion of the merits, and seem to regard any reduction from the charged offense as either a sell-out by the prosecutor or an admission that the original charge was merely a bargaining chip. Most plea negotiations, in fact, are primarily discussions of the merits of the case, in which defense attorneys point out legal, evidentiary, or practical weaknesses in the prosecutor’s case, or mitigating circumstances that merit mercy, and argue based on these considerations that the defendant is entitled to a more lenient disposition than that originally proposed by the prosecutor’s charge.⁶ The literature of negotiation suggests, indeed, that most sophisticated negotiation takes this form.⁷

To me, the essence of this practice, and what radically distinguishes it from the adversarial litigation model embodied in textbooks, criminal procedure rules, and the popular imagination, is that the *prosecutor*, rather than a judge or

adjudication process. But even where such pleas prevail, if defendants are to be induced to save the state the expense and uncertainty of trial, an implicit “bargain” that contemplates the imposition of a reduced sentence may be required. The authors say little about implicit or explicit sentence bargaining of this sort. Some of their analysis suggests they are troubled not so much by sentence bargaining as by prosecutorial charge bargaining that results in defendants who are clearly guilty of a particular crime being permitted to plead guilty to offenses that do not accurately describe their conduct. *Id.* at 68-74, 86-88, 114-15. I agree that such pleas are undesirable, but (1) it is hardly clear how often this occurs, and (2) however offensive this might be to academic seekers of truth (and, indeed, to at least some members of the public), the practical focus of both defendants and law-enforcement officials is much more likely to be on the sentence imposed than on the precise count of conviction. This focus may occasionally deflect attention from the desirability of accurately defining the defendant’s wrongdoing, but the costs of such deflection are indirect and hard to quantify when compared to the more pressing question of the appropriate level of punishment.

6. I have elaborated on this point in Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORD. L. REV.* 2117, 2129-33 (1998).

7. See generally Charles B. Craver, *Frequently Employed Negotiation Techniques*, in *CORPORATE COUNSEL’S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES* 8.043-.057 (Joey Gillan ed., 13th ed. 2002) (noting that most negotiations should include an “information phase,” in which each party learns about the other’s position, and a “competitive phase,” in which each party makes “principled” offers and concessions).

jury, is the central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues and of the appropriate sentence to be imposed). Potential defenses are presented by the defendant and his counsel not in a court, but to a prosecutor, who assesses their factual accuracy and likely persuasiveness to a hypothetical judge or jury, and then decides the charge of which the defendant should be adjudged guilty. Mitigating information, similarly, is argued not to the judge, but to the prosecutor, who decides what sentence the defendant should be given in exchange for his plea.

If I am correct in this description of the prevailing process, the defining characteristic of the existing "plea bargaining" system is that it is an informal, administrative, inquisitorial process of adjudication, internal to the prosecutor's office—in absolute distinction from a model of adversarial determination of fact and law before a neutral judicial decision maker.⁸ Instituting an aggressive screening procedure may significantly improve that process, but only if it implies that prosecutors will reach a more accurate and more just decision, rather than automatically adopting the police view of the appropriate charge or instituting excessive charges in order to bring pressure on defendants to plead. But it hardly constitutes a radical alternative to plea bargaining as actually practiced, and in important ways it merely ratifies and entrenches (or at least, assumes the inevitability of) that practice.

Such screening may have important benefits. As Wright and Miller persuasively argue, if prosecutors routinely charge excessively, bringing charges that ultimately cannot be sustained, and the resulting convictions are consistently of lesser offenses, public suspicion will inevitably grow that the defendant has been the beneficiary of some inappropriate "bargain." Eliminating or reducing this dynamic is valuable. But note that this practice should have little effect on the substantive outcomes of cases: Whether the inappropriate charge is screened out at the charge stage or on the eve of trial, the result is the same. (Presumably, unilateral prosecutorial screening will benefit poorly represented defendants who, without such screening, would fail to recognize that the inappropriate charge was merely a bargaining chip and ineptly plead to the charge that never should have been brought.) Nor does it affect the identity of the key decisionmaker: the prosecutor rather than the court. Because of this, it is difficult to see much increase in transparency. Though the defendant may plead guilty to the original charge, he is still, as in the present system, pleading guilty to whatever offense the prosecutor, after his own private adjudication, insists on. There is no public airing of the evidence against the defendant or of his defenses, and no possibility of an independent public assessment of the justice of the outcome.

8. For an extended argument about the consequences of seeing our system of justice as an inquisitorial, administrative process, see Lynch, *supra* note 6.

Such an administrative determination of guilt by executive-branch officials may be a departure from traditional due process ideals. It is not, however, intrinsically unfair. Many civilized systems of justice depend on judges who are in many ways comparable to American prosecutors. As noted above, the plea bargaining system typically provides an opportunity for a "hearing" for defendants, in which defense counsel, in attempting to negotiate a plea, have the opportunity to present defenses or mitigating facts to the governmental decision maker.⁹ For some defendants, this form of adjudication may paradoxically be preferable to the more independent judgment of a jury.

As compared with a jury trial, negotiated dispositions offer the related benefits of certainty and compromise, as opposed to the unpredictable all-or-nothing judgment of a trial. To the parties and the public, the sentence is usually the most important outcome of the criminal justice system. To the mugging victim, and to the general public, whether the mugger is convicted of attempted robbery, robbery in the first or second degree, or larceny, will rarely matter as much as whether and for how long the offender is jailed. Nor is the offense of conviction of much concern to the defendant, unless one or another offense carries different collateral consequences; he too is worried primarily about the extent of the punishment in store.

Because of this emphasis on punishment, a distinction between the sentences resulting from trial convictions and pleas tends inevitably to emerge, whether via explicit prosecutorial promise or implicit judicial practice. Absent such a differential, defendants will have an incentive to waste resources trying cases in the face of overwhelming evidence: The defendant will have nothing to lose from insisting on trial, and at least a desperate hope of a possible acquittal or hung jury.

This is not simply a matter of saving money and resources by inducing waivers of trials. Both prosecutors and defense counsel typically make decisions in order to accomplish concrete goals, and in particular to avoid worst-case outcomes. It is this fact that ultimately distinguishes a prosecutor-driven system from a pure adjudicative one. The due process adjudicative model proposes that a defendant is either guilty beyond a reasonable doubt of committing a particular crime (say, a completed rape), and thus worthy of serious punishment (say, imprisonment for ten years), or not able to be proved guilty by that standard, and thus entitled not to be punished at all. There is no verdict of "more likely than not, but not certain, to be found guilty" and thus punishable by only five years in prison.

9. Of course, in this system, the *de facto* burden of proof may be on the defendant, or at least be weaker than beyond a reasonable doubt. At the same time, so long as the possibility of "judicial review" in the form of a *de novo* jury trial exists as a meaningful opportunity, the prosecutorial adjudicator needs to make decisions that to a considerable degree mimic the predicted outcomes of jury trials in which the government will have to prove guilt beyond a reasonable doubt.

The parties, however, may very well settle on such a disposition, because the prosecutor, believing the defendant is guilty and dangerous, prefers the certainty of punishment and a substantial period of incapacitation to any significant risk of outright acquittal, while the defendant, fearing the evidence may well be good enough to secure a conviction and full punishment, prefers not to risk all on the hope of acquittal. (This motivation may be particularly powerful in the case of defendants who, whether or not guilty of the particular crime charged, have a professional or recurrent involvement in criminal activity, and thus are less likely to insist on vindicating their good name, and more likely to regard a term of imprisonment as simply a cost of doing business to be minimized rather than as an intolerable event to be avoided even at the cost of great risk.¹⁰)

This is the most important reason why plea bargaining will always be with us, unless we forbid guilty pleas altogether. The administrative adjudication of guilt and sentence ironically grows out of the adversarial system itself, with its insistence that defendants have absolute autonomy to accept the prosecutor's "verdict" by pleading guilty to the charge, and agreeing to the sentence, that the prosecutor proposes. While the public may be suspicious of dispositions that they perceive as being unfairly lenient "bargains" for dangerous defendants, I doubt it objects to this tradeoff of certainty for severity. We really want the criminal justice system to accomplish the best practicable accommodation between the conflicting goals of promoting public safety and protecting individual rights, not to produce theoretically pure outcomes. "Bargained" dispositions of cases in which conviction is uncertain may well do a better job of that than all-or-nothing jury trials.

Initial screeners can perform a valuable function in ensuring initial charges accurately reflect available evidence, but it is unlikely that they can consistently determine the ultimate "expected value" of cases by discounting the hoped-for disposition for the likelihood of conviction. Screening should reduce the number of cases in which the initial charge is predestined to drop by the wayside, which is a good thing. But it does not change the basic dynamic of the system.

Moreover, certain aspects of the New Orleans screening program endorsed by Wright and Miller, which aim to eliminate (or impose "barriers" to) postcharge bargaining over the disposition, may have negative effects on the

10. For economically based analyses of plea bargaining as a contractual system, see Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1968 (1992) (arguing that contract law illustrates the social acceptability of plea bargaining "for plea bargains are indeed paradigmatically value-enhancing bargains" while simultaneously providing a basis for challenging the acceptability of the practice "since the bargaining dynamic shortchanges the innocent"); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992) (responding to and critiquing the claims made by Scott and Stuntz).

justice of outcomes. The authors seem to assume, in my opinion unjustifiably, that the charge determined by the prosecutors at an early stage of the case should normally be the charge to which the defendant pleads guilty or that is tried. If the prosecutor is essentially determining guilt, operating as a kind of inquisitorial, administrative adjudicator of the merits of cases, it becomes critical to provide a fair opportunity, within the internal administration process, for the defendant to present evidence, challenge the prosecutor's case, and argue defenses and mitigating circumstances. It is difficult to see how such an opportunity can be provided at the typical screening stage between arrest and charge, before defense counsel can possibly have an adequate opportunity to investigate the case. But Wright and Miller seem to consider it a *virtue* of the New Orleans system that defense lawyers rarely have the opportunity to have input at the screening stage. Indeed, they suggest that it is a good thing that, in New Orleans, defendants are assigned attorneys late in the process so that no precharge bargaining can occur!¹¹ It could be claimed, of course, that the defendant's opportunity for input is supposed to be at the trial, not in the prosecutor's office, but this response does not seem possible for authors who are seeking a system that will preserve a low rate of trials, and whose theoretical point is that advance prosecutorial screening, not more trials, is the proper alternative to plea bargaining.

It is questionable whether an initial screener can decide what charge should be tried, to the exclusion of the trial prosecutor's evolving understanding of the case. Every trial lawyer knows how a case that looks solid on paper can weaken as one prepares for trial, interviews witnesses in greater depth, responds to motions, prepares closing arguments, and addresses issues raised by one's adversary. Establishing "barriers" to reductions in charge in response to input from the defense and/or the greater depth of knowledge achieved by trial counsel seems counterproductive to achieving just outcomes. The New Orleans system's "success" in reducing the percentage of pleas to lesser charges reflects favorably on the system to the extent that it reflects the elimination of weak charges by screening prosecutors on their own initiative. To the extent, however, that it reflects a rigidity in adhering to charges in the face of potentially meritorious defense arguments, the reduction may be a mixed blessing.

In short, I suspect that Wright and Miller are too quick to accept the conventional view that "plea bargaining" is a bad thing, without focusing carefully enough on what aspects of the plea bargaining system are undesirable, and why they desire to eliminate it. As a result, I think they fail to recognize that they are actually accepting the most fundamental revolution worked by the practice of plea bargaining—the elimination of courtroom trials and the dominance of the criminal justice process by the prosecutor—and they

11. Wright & Miller, *supra* note 1, at 77-79.

underestimate some of the virtues of the negotiated disposition. But this should not obscure the importance of the empirical work they have done, nor the theoretical advance they make. The great benefit of Wright and Miller's excellent article is to focus our attention not on lamenting the absence of trials, but on improving the administrative adjudication system (misabeled plea bargaining) so that it functions better and more fairly. Serious prosecutorial screening to eliminate unjustifiable charges can be a real improvement in the system. Reducing the opportunity for defendants to have meaningful input into the disposition has the opposite effect.